36.

# SUPREME COURT OF THE UNITED STATES.

## No. 223.

THE UNITED STATES, APPELLANTS,

vs.

THE HEIRS AND REPRESENTATIVES OF SAMUEL DAVENPORT.

APPEAL FROM THE DISTRICT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.


| | Original. | Print. |
|---|---|---|
| Petition of plaintiffs | 1 | 2 |
| Acceptation of service thereof by defendants | 5 | 4 |
| Answer of defendants | 5 | 4 |
| Entry of record, continuance | 5 | 4 |
| " " submission of cause | 6 | 4 |
| Inventory offered in evidence by plaintiffs | 6 | 5 |
| Entry of record, judgment for plaintiffs engrossed and signed May 30th | 18 | 8 |
| Reasons referred to in judgment | 13 | 9 |
| Entry of record, order of appeal | 15 | 10 |
| Agreement in relation to transcript for Supreme Court | 16 | 10 |
| Clerk's and judge's certificates | 17 | 11 |
| Citation of appeal and return | 18 | 11 |

Eastern district of Louisiana, United States court, sitting at New Orleans, in chancery.

HEIRS OF DAVENPORT
vs.
The UNITED STATES. } No. 20.

*Land Cause.*

Be it known and remembered that heretofore, to wit, on the twenty-eighth day of May, A. D. one thousand eight hundred and forty-six, being at the May term of said year of the said court, the heirs and legal representatives of Samuel Davenport, deceased, came by their solicitor, Henry Boyce, esq., into the clerk's office, and there filed their petition, which is in the words and figures following, to wit:

To the honorable the judge of the United States district court, holding sessions at N. O., in and for the State of Louisiana.

The petition of Eliza Theresa Davenport, wife of Lewis G. De Russy, both of the parish of Natchitoches, in said State, he authorizing and joining her herein; of Jane Bell Hart, wife of William Hart, who aids and authorizes her herein, both of Nacogdoches, in the State of Texas, the said Jane B. Hart acting herein as the natural tutrix and mother of her minor children, John Edward Davenport, aged 10 years, John B. B. Davenport, aged 12 years, and Susan Azelie Davenport, aged 15 years, they being the children of John Bernard Benjus Davenport, deceased, and his heirs.

Those petitioners respectfully represent that they are the owners of certain lands in the parish of Sabine, in the State of Louisiana, within the jurisdiction of your honorable court, in manner following, to wit, that on the 15th of Dec., 1795, when the space of country mentioned formed part of the dominion of Spain, Bernardo Fernandez, as lieut. governor and commandant of Nacogdoches, did in due form of law and usage, after various proceedings had, grant and concede to Jacinte Mora a tract of land on the east side of the Sabine river, at a place called "Las Ormigas," said land being delivered to him in a square form, and having a front of 6 leagues on each side of the square, and said to contain 207,360 superficial acres; the location of said land will more plainly appear by a survey made formerly by Wm. M. Lester, and more recently by order of the surveyor general, by S. & W. T. Walmsly; that after the said concession of land was thus made to Jacinte Mora, he did, for a valuable consideration, sell the same as his property on the 22d of July, 1805, to William Barr & Co., a firm then composed of said Wm. Barr, Edward Murphy, Luther Smith, and Sam'l Davenport, the ancestor of your petitioners.

That afterwards, in the same district of country, on the 4th of August, 1798, after various preliminary proceedings had, one Jose Maria Guadian, as military and civil commandant of the post of Nacogdoches, being thereto duly authorized by the crown of Spain, did, in due form of Spanish law and usages, concede and grant to the said Edward Murphy a tract of land at the east side of the Sabine, at a place called

"La Nana," having for its centre a prairie, and laid out in a square form, with a space of four leagues on each front of the square, and said to contain the superficial quantity of 92,160 acres; and afterwards, on the 3d of November, 1798, the said Edward Murphy sold the same to the said commercial firm of which he was a partner.

They aver that if those concessions were not equal to the highest degree of grants under the jurisprudence of Spain, they yet vested a right of property which, by the laws and customs of that country, would have ripened into such grants had she retained possession of the country. But that by treaty with France she transferred the country of Louisiana, stipulating in favor of individuals the security of their rights of property, and subsequently, by this treaty of 1803, the same was transferred by France to the United States. That since that period the proprietors of these lands have more than once applied to the board of commissioners appointed by the Government to examine and adjust land claims derived from the former government of the country. Those commissioners, after examining the evidence supporting these claims and property, impressed with their justice and equity, did recommend the same for confirmation; but, in defiance of said recommendation they have never been confirmed, but on the contrary, the officers of the United States claim the same to be part of the public domain, and to the injury of your petitioners persist in saying so, and have had the same surveyed as a preliminary proceeding preparatory to offering them for sale.

Now, your petitioners further represent, that these two concessions of land having continued in the joint ownership and possession of the said Barr, Davenport, Smith, and Murphy, and those who represented them, down to the year 1832, on the second of April of that year, an act of partition was made at Natchitoches by the representations of said firm, by which one-fourth of said grants was transferred in full property to your petitioner, Eliza Theresa Davenport, and to John B. B. Davenport, the father of your other petitioners; they at the time being the heirs of Samuel Davenport, deceased. That this one-fourth, designated in said petition as lot No. 1, and laid down on a map which will be produced on the trial of this cause with the said partition, if deemed necessary, is now the individual and exclusive property of your petitioners. That yet, as stated, the United States set up a title to the same, but do not know that any individual citizen does, either by purchase or other disposition made by the United States.

For a more full description of the rights of said land, and the various acts done in relation to them by the persons interested, the Government and others, they beg to refer to the case of Yates and McIntire against the United States, now on the file of this honorable court, and they reserve the equitable right of amending this petition with the permission of this honorable court, to set out more fully their cause if needful.

Your petitioners now pray, in accordance with the act of Congress of the 17th of June, 1844, and other existing laws, that the district attorney of the United States, as the representative thereof, be cited to an-

swer hereto; that your honor will decree that your petitioners have a full right of property in these lands against the United States; that you will decree a patent to issue to them for the same by the proper officers, after inquiring into and deciding on their claims. And should it be found that the United States have sold or disposed of any of said lands to other persons, these petitioners pray the privilege of locating an equal quantity on other public lands, and they pray for such legal and equitable relief as may be accounted; and, as in duty bound, &c.

(Sig'd) H. BOYCE,
*Att'y for petitioners.*

And the following petition was thus endorsed:

Service accepted, May 28th, 1846.

(Sig'd) S. W. DOWNS,
*U. S. Att'y, district of La.*

And thereafter, at the same term, to wit, on the fifth day of November, A. D. 1846, appeared the defendants, by their attorney, Thomas J. Durant, and filed in the clerk's office the following

*Answer.*

HEIRS OF DAVENPORT
vs.
The UNITED STATES.

Dist. court of the United States, for the district of Louisiana.

The defendants now come, and for answer deny all and singular the facts and allegations of plaintiffs' petition.

Wherefore they pray that plaintiffs' petition may be dismissed at their costs.

(Sig'd,) THOMAS J. DURANT, *Att'y.*

And afterwards, at the December term, to wit, on the 10th day of February, A. D. 1847, the following entry was recorded on the minutes of said court:

HEIRS OF DAVENPORT
vs.
The UNITED STATES. } No. 20.

This cause being fixed for trial this day, was, upon motion of the United States district attorney, the court being engaged in other business, continued until further notice.

And afterwards, at the February term, to wit, on the seventh day of March, A. D. 1849, the following entry was made of record on the minutes of the court:

HEIRS AND REPRESENTATIVES
OF SAMUEL DAVENPORT
vs.
The UNITED STATES. } No. 20.

This cause came regularly up for hearing to-day; Henry Boyce, esq., for the complainants, and the U. S. district attorney for the defendants,

appearing. It being agreed by counsel, and with the sanction of the court, that the evidence offered on behalf of the respective parties in the case of Yates & McIntire vs. The United States, numbered five on the docket of land causes, be, with the exception of such portions thereof as relate to the mesne conveyances from Luther Smith to Yates and McIntyre, considered and received as evidence in this cause; additional testimony was adduced on behalf of the complainants, and argument heard, and the case thereon submitted to the consideration of the court.

And further, on the same day, to wit, the 7th day of March, A. D. 1849, was offered in evidence the following

*Inventory, to wit:*

Be it remembered, that upon this second day of April, in the year of our Lord one thousand eight hundred and thirty-two, and of the independence of the United States of America the fifty-sixth, in pursuance of an order or decree of the honorable the court of probates of the parish of Natchitoches, in the State of Louisana, bearing date the thirty-first day of March, in the year of our Lord one thousand eight hundred and thirty-two, I, Richard Tennessy, notary public, acting in and for the parish of Natchitoches, aforesaid, duly commissioned and sworn as such, and at my office in the said parish of Natchitoches, and in presence of Fenelon W. Ragland and Benjamin F. Chapman, both competent and subscribing witnesses, and residents of said parish, did cause to come before me Eliza T. Russell and Samuel P. Russell, both of said parish; she, the said Eliza T. Russel, being hereunto assisted and authorized by her husband, the said Samuel P. Russell; also John Bernardo Beniguo Davenport, also of said parish, they, the said Eliza and John, being the legal heirs of Samuel Davenport, of said parish, deceased; also, personally came and appeared, Robert Thompson of Washington county, in the State of Pennsylvania, as the attorney in fact of the legal heirs of the deceased William Barr, to wit, John Huston and his wife Nancy, of Washington county aforesaid; David B. Kennedy and his wife Mary; John McKnight and his wife Nancy; William Dunstsee and his wife Acksah, all of the county of Alleghany, in the said State of Pennsylvania; also appeared John Laplace, of the said parish of Natchitoches, as attorney in fact of Mary Aspasie Gaillard, and of her husband Raymond Pierre Gaillard, both of the city of New Orleans; also appeared Charles E. Greneaux, as the attorney in fact of Marie Eugenie Tauzin, and her husband Louis Tauzin, of the said parish of Natchitoches, and of Arnaud Laune, senior, curator ad bona of his son Arnaud Laune, junior, and curator ad bona of Edward Murphy, and tutor of Ophelia and Adele Murphy; and also appeared Victorine Metoyer, of said parish of Natchitoches, as tutor of Dennis Murphy; they, the said Marie Aspasie Gaillard, Marie Eugenie Tauzin, Arnaud Laune, junior, Edward, Ophelia, Adele, and Dennis Murphy, being the legal heirs of the deceased Edward Murphy, of said parish of Natchitoches; also appeared Samuel Smith, of Little Falls,

of Herkimer county, in the State of New York, representing as heir and owner the succession of Luther Smith, of bayou Tunica, parish of West Feliciana, in the said State of Louisiana.

Whereupon I, the said notary, in presence of the witnesses and parties aforesaid, did proceed to make an inventory of all the property in common between the said heirs of Samuel Davenport, William Barr, Edward Murphy, and Luther Smith, all deceased, the said property being situate in said parish of Natchitoches, and of which said property Bernard Leonard and James Bludworth, esquires, both of the said parish of Natchitoches, were appointed experts by the honorable the court of probates aforesaid to appraise the same, and to divide it into four lots of equal value, according to law; and said experts being duly sworn, said inventory and appraisement is as follows—that is to say, one tract of land situate in said parish, bounded on the west by the river Sabine, and known by the name of the Ormigas tract, represented by a plat of survey, dated July second to August fourteenth, signed by "Will. McLester, deputy surveyor, Peter Young and Thomas Ford, chain carriers," and which tract is by said experts divided into four equal parts, as follows: No. 1, one-fourth part of the said tract in width, on the southern side of the said tract; No. 2, one-fourth part of the said tract in width, northerly of No. 1 and adjoining it; No. 3, one-fourth part of said tract in width, northerly of number two and adjoining it; No. 4, the last and most northerly fourth part of said tract in width, and adjoining number three—the division lines all parallel and running north sixty-six degrees east, and south sixty-six degrees west, through the whole length of the tract aforesaid, to the river Sabine. Also one other tract of land, called the Lanana tract, represented by a plat copied from the original plat by B. Leonard, parish surveyor of the parish of Natchitoches, signed by him and dated November 17th, 1831, and which said last tract is by said experts divided into four equal parts, as follows: No. 1, one-fourth part of the said tract, on the east side; No. 2, one fourth part of the said tract, adjoining number one and west of it; No. 3, one-fourth part of said tract, adjoining number two and west of it; No. 4, one fourth part of the said tract, adjoining number three and westernmost of the whole tract; and both which said tracts, to wit, the said Ormigas and Lanana, contain each the following number of acres, as is said, to wit: the said Ormigas tract of land two hundred and twenty-seven thousand three hundred and sixty superficial acres, estimated at five cents per acre, and making the sum of ten thousand three hundred and sixty-eight dollars—(amount carried over, $10,368 00; amount brought forward, ten thousand three hundred and sixty-eight dollars, $10,368 00)—the said Lanana tract of land containing, as is *is* said, ninety-two thousand one hundred and sixty superficial acres, and appraised at five cents per acre, and making the sum total of four thousand six hundred and eight dollars, $4,608 00. Recapitulation of both amounts of said two tracts of land amount to the sum total of fourteen thousand nine hundred and seventy-six dollars, $14,976 00. Afterwards, to wit, upon the said second day of April, in the year of

our Lord one thousand eight hundred and thirty-two, at said place, in presence of said parties, experts, witnesses, and notary aforesaid, the said tracts of land were divided, according to law and the will of said parties, into four lots of equal value, as follows, to wit: Number one of the Ormigas tract and No. one of the Lanana tract forming the first lot, and termed lot number one; number two of the Ormigas tract and number two of the Lanana tract forming the second lot, and termed lot number two; number three of the Ormigas tract and number three of the Lanana tract forming the third lot, and termed lot number three; number four of the Ormigas tract and number four of the said Lanana tract of land forming the fourth lot, and termed number four; and there being no more property to inventory, and no claims or debts against the successions aforesaid all the proceedings aforesaid were closed. Whereupon the said parties, by mutual consent, proceeded to draw by lot for the lots aforesaid; and upon examining the same, it appeared that the heirs of William Barr, represented by the aforesaid Robert Thompson, drew lot number four; that the heirs of Luther Smith, represented by the said Samuel Smith, drew lot number two; that the heirs of Samuel Davenport drew lot number one, and that the heirs of Edward Murphy drew lot number three. And there being no question or difficulty made or raised respecting the inventory or appraisement aforesaid, nor of the manner of making or drawing said lots, or respecting any other part or portion of the proceedings in the premises, and no deduction or collation to be made between the said parties, the present proceedings are therefore closed.

In testimony whereof the said parties, experts, witnesses, and notary aforesaid, have hereunto set their hands on the day and year first above written, and at the place aforesaid.

(Signed) Eliza T. Russell, Samuel P. Russell, J. B. B. Davenport, Robert Thompson, attorney in fact for the heirs of William Barr; John Laplace, attorney in fact of R. P. Gaillard and his wife, Marie Aspasie Gaillard; C. E. Guenaux, attorney in fact of Marie Eugénie Fauzin and her husband Louis Fauzin, and of Arnaud Laune, senior, curator ad bona of his son, Arnaud Laune, junior, and curator ad bona of Edward Murphy and tutor of Ophelia and Adele Murphy; Metoyer, tutor of Dennis Murphy; B. Leonard, James Bludworth, experts; witnesses, F. W. Ragland, Benjamin F. Chapman; Richard Tennessy, notary public, acting in and for the parish of Natchitoches, in the State of Louisiana.

I certify the above and foregoing to be a true copy of the original on file and of record in my office.

Given under my hand and seal of office, at Natchitoches, this 25th day of January, A. D. 1844.

[SEAL.] (Signed) F. WILLIAMS, *Not. Pub.*

And afterwards, at the May term, to wit, on the 26th day of May, A. D. 1849, was duly recorded, (engrossed and signed on the 30th day of May, 1849,) the following judgment:

May term, 1849.

*Saturday, May* 26, 1849.

Present, hon. Theo. H. McCaleb.

HEIRS AND REPRESENTATIVES OF SAMUEL DAVENPORT vs. THE UNITED STATES. } No. 20.

This cause came on for trial on the 7th day of March last, at the February term, 1849, of this court, on petition and answer, the evidence of record in the case of Yates & McIntyre vs. The United States, No. 5 of the docket, and other proofs exhibited on the hearing; and after mature consideration of the same, it appearing to the court that the petitioners have fully made out their case under the provisions of the act of Congress, approved on the 17th June, 1844, which revives and extends to Louisiana, and other States, the act approved on the 26th of May, 1824, and entitled "An act enabling the claimants to lands within the limits of the State of Missouri, and territory of Arkansas, to institute proceedings to try the validity of their claims;" and it also appearing to the satisfaction of the court that the claim of the petitioners was secured by treaty stipulations, and is good and valid by the laws of nations, the usages and customs of the Government under which the same originated, and by the several acts of Congress:

It is, therefore, for the reasons given in the said case of Yates & McIntyre versus The United States, and for others now of record herein, ordered, adjudged, and decreed, that the petitioners recover of the United States the lot numbered one in the La Nana tract, or grant of land, and that likewise numbered one in the Ormigas tract, or grant of land, as prayed for in their petition, which lots are described in a certain plat of survey made by Wamsly, and also fully described as lots numbers one in each of the aforesaid tracts, or grants of land, in a judicial partition made by the probate court of the parish of Nachitoches, on the 26th day of April, 1833, a copy whereof is now of record in the said suit of Yates & McIntyre vs. The United States.

It is further ordered, adjudged, and decreed, that in case it shall be found that the United States have sold or otherwise disposed of any portion of the aforesaid tracts or grants of land, so decreed to the said petitioners, then they, the said petitioners, shall be entitled to locate an equal quantity elsewhere, according to the provisions of the 11th section of the act of Congress, approved on the 26th of May, 1824.

It is further ordered, adjudged, and decreed, that the petitioners pay the costs of this suit.

Judgment rendered May 26th, 1849.

Judgment signed May 30th, 1849.

(Signed) THEO. H. McCALEB, [SEAL.]
*United States Judge.*

Reasons (other) referred to and annexed to the foregoing judgment.

HEIRS AND REPRESENTATIVES OF SAMUEL DAVENPORT vs. THE UNITED STATES.

The land claimed by the petitioners in this case is covered by the Ormigas and Lanana grants; the validity of which was recognised by this court in the case of Yates and McIntyre vs. The United States. The opinion of the court in that case is in all respects applicable to the rights of the present petitioners.

The district attorney, however, has contended that the grantees were not residents of the province of Louisiana at the date of the grants, and that the petitioners therefore have failed to bring their case within the provisions of the act of Congress of 1824, revived by the act of 1844. The first section of the act revived requires that the lands sued for must be claimed "by virtue of any French or Spanish grant, concession, warrant, or order of survey, legally made, granted, or issued, before the 10th day of March, 1804, by the proper authorities, to any person or persons resident in the province of Louisiana at the date thereof, or on or before the 10th of March, 1804.

Upon a reference to the petition presented by Edward Murphy, soliciting the grant known as the "Lanana" grant, he expressly styles himself a resident of Natchitoches, which was within the acknowledged limits of the province of Louisiana. The counsel of the United States was doubtless misled by the English translation of the petition and grant which were introduced in evidence. The translation of the petition mentions the grantee as a resident of Nacogdoches, in the province of Texas. The original, however, must be my guide, and it clearly brings the case of the petitioners within the requisitions of the act of 1824. The objection urged by the counsel of the United States cannot therefore apply to the "Lanana" grant; nor can it prevail against the "Ormigas" grant, as we shall see by an inspection of the conveyance from the grantee, Jacinta Mora, to José Piernas, executed on the 25th of April, 1796. The former is there expressly stated to be "actually residing in the city of New Orleans"—"residente actualmente en esta ciudad de la Nueva Orleans." It is therefore clearly established that, even if he were not a resident of the province of Louisiana at the date of the grant, he was such before the 10th of March; 1804, and the petitioners have therefore brought themselves fully within the provisions of the act of 1824.

There exists then no reason why the court should change the opinion which it formed and expressed, after mature deliberation, in the case of Yates & McIntyre vs. The United States.

It is therefore ordered, adjudged, and decreed, that the petitioners be, and they are hereby, declared entitled to the ownership and possession of the land set forth and described in their petition.

And thereafter, at the same May term, to wit, on the thirtieth day of

May, A. D. 1849, was moved for in open court, granted, and recorded, the following—

*Order of appeal.*

UNITED STATES OF AMERICA,
*Eastern district of Louisiana.*

WEDNESDAY, *May 30th*, 1849.

Present, the Hon. Theo. H. McCaleb.

HEIRS AND REPRESENTATIVES OF SAML. DAVENPORT vs. THE UNITED STATES. } No. 20.

On motion of Logan Hunton, attorney of the United States for the district aforesaid, and of Thomas J. Durant, on the same behalf, and on giving the court to understand and be informed that the United States are injured and aggrieved by the judgment of this honorable court, rendered against them at this term, in the matter of the Heirs of Davenport versus The United States, and desire to appeal therefrom.

It is thereupon ordered by the court, that an appeal be allowed in favor of the United States from the judgment aforesaid, returnable to the Supreme Court of the United States at the next term thereof after the date of this order.

AND further, and finally, at the same term, to wit, on the 12th day of June, A. D. 1849, was filed of record in the clerk's office the following:

*Agreement in relation to transcript for Supreme Court.*

DISTRICT COURT OF THE U. STATES,
*For the eastern district of Louisiana.*

HEIRS OF S. DAVENPORT vs. THE UNITED STATES. }

It is hereby agreed to by the district attorney of the U. S., and the attorney for the heirs of S. Davenport, that the transcript, to be used in an appeal to the Supreme Court of the United States in this case, shall consist of the transcript now in Washington city, heretofore made out in the case of Yates and McIntyre versus The United States, being a controversy in relation to the same land claims now in dispute for a certain part thereof, and the new evidence adduced in this case. And that the clerk of the court shall only make out and certify a copy of the latter, which, with the foregoing transcript of Yates and McIntyre vs. the U. States, shall constitute the whole record or transcript in which the case will be directed in the Supreme Court of the U. States. This agreement to be filed in the record. In testimony whereof we sign this, June 12th, 1849.

(Signed) LOGAN HUNTON,
*U. S. district attorney.*
HENRY BOYCE,
*For heirs of Davenport.*

UNITED STATES OF AMERICA,
*Eastern district of Louisiana.*

I, Needler R. Jennings, clerk of the district court of the United States, sitting at New Orleans, in and for said district, do hereby certify, that the foregoing sixteen folios of manuscript contain and form a true, faithful, correct, and complete transcript of all the proceedings, process, pleadings, documents, and other matters, as they now remain on file and of record in a certain cause in chancery, wherein the heirs of Saml. Davenport, deceased, are plaintiffs, and the United States of America defendants, No. 20 of the land docket of said court.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at the city of New Orleans, this twenty-[SEAL.] fourth day of September, one thousand eight hundred and forty-nine, and the 74th year of American independence.

N. R. JENNINGS,
*Clerk U. S. district court, eastern dist. of Louisiana.*

I, Theodore H. McCaleb, judge of the district court of the United States, for the eastern district of Louisiana, do certify, that N. R. Jennings, who subscribed the above certificate, was at the time of signing the same, and is now, the duly appointed and legally authorized clerk of said court; that full faith and credit are due, and ought to be given, to all his attestations as such clerk, and that his above certificate is in due form of law.

Witness my hand and seal, at New Orleans, this 25th day of September, A. D. 1849.

THEO. H. McCALEB. [SEAL.]

The United States of America, to the heirs and representatives of Saml. Davenport, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the first Monday of December next, pursuant to an order of appeal granted on the thirtieth day of May, 1849, by the district court of the United States, in and for the eastern district of Louisiana, in a certain cause in chancery, (under the acts approved May 26th, 1824, and June 17th, 1844,) entitled (No. 20) Heirs and Representatives of Saml. Davenport vs. The United States, wherein the said United States of America are now appellants and you are appellees; to show cause, if any there be, why the judgment rendered against the appellants, as in the said order of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness hereto my hand and the seal of the said court, at the city of New Orleans, this twenty-fourth day of September, A. D. 1849.

THEO. H. McCALEB, [SEAL.]
*Judge of U. S. district court, eastern district of Louisiana.*

Judge HENRY BOYCE, *Att'y.*

Attest: ROBT. M. LUSHER, *Deputy clerk.*